IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 657

CARNATION COMPANY,

Petitioner,

vs.

PACIFIC WESTBOUND CONFERENCE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF IN OPPOSITION FOR RESPONDENTS, FAR EAST CONFERENCE, AND MEMBERS AND CERTAIN FORMER MEMBERS THEREOF NAMED AS DEFENDANTS

Reason for Submission

This Supplemental Brief in Opposition to the petition is occasioned not by afterthoughts regarding the petition itself, but by the memorandum for the Federal Maritime Commission filed herein. In that memorandum, the Commission, speaking through the Solicitor General, has taken a position quite inconsistent with the position which, speaking for itself, it took in the courts below. It is also a position different from that taken by any other party in this Court.

We seek this opportunity to deal solely with the new contention injected by the Commission's memorandum.

Statement

The Commission urges here that this Court grant the writ of certiorari, vacate the judgment below, and remand the cause with directions to retain the case on the docket of the district court pending the determination of the administrative proceeding. Such a disposition of the matter must assume that there is an eventuality which may arise at the conclusion of the pending administrative proceeding and any judicial review thereof, which would leave unadjudicated some claim in the present complaint which could be the foundation for antitrust relief. The Commission's memorandum avers (p. 5) that the issue of whether petitioner ultimately will have a remedy under the antitrust laws was not passed upon below. We submit that the court of appeals clearly ruled that the present complaint states no claim for antitrust relief.

Thus, the court of appeals stated (336 F. 2d at 653) that motions to dismiss, on the ground that the Shipping Act provides the *exclusive* remedy for the alleged wrongs and that the district court lacked jurisdiction, had been granted, and that two decisions of this Court plainly supported and required dismissal by the district court. Again (336 F. 2d at 657), the court of appeals stated that it felt called upon to expand on the reasons why "exclusive primary jurisdiction must be upheld here." The court of appeals

was troubled by a small portion of the opinion in *Far East Conference* v. *United States,* 342 U.S. 570, 576-7 (1952), but resolved its doubts in favor of dismissal. This it did, "Since we hold that such an action [an antitrust suit] cannot at this date be maintained * * *." (336 F. 2d at 667, n. 32).

We submit that there is no eventuality reasonably to be suggested in which there could be a basis for an antitrust proceeding arising out of the present complaint. The Commission's memorandum is no help. The questions which, it states, are involved in the case are, it agrees, Shipping Act questions (memorandum, p. 4). Nowhere does it suggest what questions under the antitrust laws may be involved in the complaint now, or may somehow be materialized by reason of the Commission's disposition of its administrative inquiry into the very transactions alleged in the complaint.

Petitioner predicates its claim for relief upon concerted action of the respondents to enhance ocean freight rates. Section 15 of the Shipping Act, 1916, 39 Stat. 733, as amended by 75 Stat. 763 (46 U.S.C. §814), clearly confers upon the Commission jurisdiction to deal with agreements among common carriers by water, "fixing or regulating transportation rates or fares", or "controlling, regulating, preventing, or destroying competition", or "in any manner providing for an exclusive, preferential, or cooperative working arrangement." The term "agreement" in §15 includes "understandings, conferences, and other arrangements." It was clear below, both to the district court and to the court of appeals, that the agreement and conspiracy charged in the complaint was

within the Commission's jurisdiction under §15. The Commission is exercising its jurisdiction in its pending Docket No. 872 (*In the Matter of Agreement No. 8200—Joint Agreement Between the Member Lines of the Far East Conference and the Member Lines of the Pacific Westbound Conference,* initial decision served August 30th, 1963, 2 Pike & Fischer Ship. Reg. Rep. 900). Petitioner has indeed availed itself of that jurisdiction by intervening in F.M.C. Docket No. 872. It could equally readily have filed with the Commission a complaint seeking reparation for alleged violations of §15. Sec. 22 of the Shipping Act, 1916, 39 Stat. 736 (46 U.S.C. §821).

If the Commission's jurisdiction under §15 is exclusive[1] as well as primary, there can be no basis for judicial proceedings under the antitrust laws, now or after the ultimate disposition of F.M.C. Docket No. 872. That being so, the only proper disposition of this case is that which was adjudged below, *i. e.,* dismissal.

It may be observed that the Commission, in the district court, moved to dismiss without any suggestion of retention on the docket (R. 34). The district court so understood the Commission's position (R. 65), as did the court of appeals (336 F. 2d at 653).

Now that the Solicitor General has exercised his prerogative of controlling the litigation on behalf of the Commission, we find an abrupt departure from the

[1] Subject, of course, to judicial review proceedings under the Judicial Review Act (Federal Agencies), 64 Stat. 1129, as amended (5 U.S.C. §§1031, *et seq.*).

Commission's approach below. Herein, we submit, lies confirmation of the validity of the supersession doctrine, and one of the premises on which it relies. Inevitably, the agency charged by Congress with the administration of the specialized regulatory statute will, when the philosophy of that statute differs radically from the philosophy of the antitrust laws, find itself in conflict with the agency of Government charged with the enforcement of the antitrust laws. This much was made clear in *Far East Conference* v. *United States,* 342 U.S. 570 (1952), where the Commission intervened to urge dismissal of an antitrust suit brought by the Attorney General. The Commission's position was upheld, partly to avoid the stultification of the Government and the harassment of industry which must result from coordinate inconsistent regulatory commands. 342 U.S. at 575.

The Memorandum for the Commission seizes on a single sentence in the opinion in *Far East Conference* as an intimation of precedent for the suggestion that jurisdiction of this suit be retained. There, this Court stated, after observing that there was no purpose in retaining jurisdiction (342 U.S. at 577), "A similar suit is easily initiated later, if appropriate." The circumstances which would render such a later suit appropriate were not explained. The reason for the quoted expression may be found in the Court's discussion (342 U.S. at 576) of the Government's contention that it might not have standing to complain before the Commission. Although the Court dismissed this suggestion as "almost frivolous", it may be against this improbable possibility that the door was left open to reinstitution of the court proceedings.

Otherwise, the sentence regarding institution of a later suit is most difficult to explain. The decision and opinion in *United States Navigation Co.* v. *Cunard Steamship Company, Ltd.*, 284 U.S. 474 (1932), was fully reaffirmed in *Far East Conference*. This Court said of the governing effect of *U.S. Navigation Co.* (342 U.S. at 576):

> "* * * The same considerations of administrative expertise apply, whoever initiates the action. The same Antitrust Laws and the same Shipping Act apply to the same dual-rate system. To the same extent they define the appropriate orbits of action as between court and Maritime Board."

In *U.S. Navigation Co.*, after observing that the wrongs charged constituted violations of the Shipping Act, this Court stated (284 U.S. at 485), "the remedy is that afforded by the Shipping Act, which to that extent supersedes the antitrust laws." Again, in disposing of the argument that failure to file an agreement gives the basis for an antitrust proceeding, this Court said (284 U.S. at 486):

> "* * * But a failure to file such an agreement with the board will not afford ground for an injunction under §16 of the Clayton Act at the suit of private parties—whatever, in that event, may be the rights of the government—since the maintenance of *such a suit, being predicated upon a violation of the antitrust laws, depends upon the right to seek a remedy under those laws, a right which, as we have seen, does not here exist.* If there be a failure to file an agreement as required by §15, the board as in the case of other

violations of the act, is fully authorized by §22, supra, to afford relief upon complaint or upon its own motion. Its orders, in that respect, as in other respects, are then, under §31, *for the first time*, open to a judicial proceeding to enforce, suspend or set them aside * * *." (Italics supplied.)

We submit that this decision, reaffirmed in *Far East Conference*, could not more clearly hold that any subject matter within the coverage of the Shipping Act is to be dealt with exclusively under the Shipping Act.

There being no matters alleged in the present complaint which are not within the Commission's jurisdiction under the Shipping Act,[2] the complaint was properly held below to be insufficient and ordered to be dismissed.

Finally, we point out that the Commission's suggestion involves a fundamental and important issue with respect to the meaning and scope of the supersession and exclusive primary jurisdiction doctrines. Accordingly, we submit that it would be inappropriate to act on the suggestion except after a plenary hearing.

[2] The court of appeals summarized the questions for the Commission, raised by the complaint, in its *per curiam* opinion denying the petition for rehearing (336 F. 2d at 668)

Conclusion

The suggestion of the Federal Maritime Commission should be rejected and the petition should be denied.

Respectfully submitted,

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